Supreme Court, U.S.
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No. 96 48

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In The

Supreme Court of the United States

October Term, 1995

LAKE AT LAS VEGAS INVESTORS GROUP, INC.,

Petitioner,

v.

BOTABA REALTY COMPANY, BSF PARTNERS, SID R. BASS, ROBERT M. BASS and LEE M. BASS,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

BRUCE W. KAUFFMAN
(Counsel of Record)
CARL H. HANZELIK
VIRGINIA H. MILLER
DILWORTH, PAXSON, KALISH & KAUFFMAN
3200 Mellon Bank Center
1735 Market Street
Philadelphia, Pennsylvania 19103
(215) 575-7000

BARRY L. LIEBERMAN
DICKERSON, DICKERSON, LIEBERMAN & CONSUL
Suite 1130, The Phoenix Building
330 South Third Street
Las Vegas, Nevada 89101
(702) 388-8600

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

63 pp

QUESTION PRESENTED

In a diversity action, does state or federal law govern the res judicata effect of a judgment from a prior diversity action?

PARTIES

Petitioner (appellant below) is Lake at Las Vegas Investors Group, Inc. It has no parent or subsidiary company.

Respondents (appellees below) are Botaba Realty Company, BSF Partners, Sid R. Bass, Robert M. Bass and Lee M. Bass. Petitioner does not know of any parent company of Botaba Realty Company or of any non-wholly owned subsidiary companies of respondents.

Other parties to the district court action are Pacific Malibu Development Corporation, Barry Silverton and Lake at Las Vegas Joint Venture.

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PETITION FOR WRIT OF CERTIORARI

Lake at Las Vegas Investors Group, Inc. petitions for a writ of certiorari to review the Judgment and decision of the United States Court of Appeals for the Ninth Circuit entered on February 23, 1996, and amended on April 9, 1996.

OPINIONS BELOW

The Memorandum of the Ninth Circuit, and the Order of the Ninth Circuit Amending Memorandum and Denying Rehearing, from which certiorari is being sought are not reported but appear in the Appendix at A-1 and A-6, respectively. The Opinion of the District Court appears in the Appendix at A-8.

A prior decision of the Ninth Circuit in this case, as amended in response to a petition for rehearing, is reported at 933 F.2d 724 (1991). The original decision in that earlier appeal is included in the Appendix at A-23. The Order and Amended Opinion on Rehearing is included in the Appendix at A-35.

JURISDICTION

The Judgment of the Ninth Circuit was entered on February 23, 1996. Investors filed a Petition for Rehearing and Suggestion for Rehearing En Banc and, on April 9, 1996, the Ninth Circuit entered an Order Amending Memorandum and Denying Rehearing.

This Court has jurisdiction over this Petition for a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

PROCEDURAL RULE INVOLVED

The pertinent part of Fed.R.Civ.P. 41 provides:

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

> **(1) By Plaintiff; by Stipulation.** Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, **except that** a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim. (Emphasis added.)

STATEMENT OF THE CASE

Petitioner Lake at Las Vegas Investors Group, Inc. ("Investors") commenced the underlying litigation on October 9, 1987 in Nevada state court. The Complaint sought hundreds of millions of dollars in damages from

(a) Pacific Malibu Development Corporation ("Pacific Malibu") and Barry Silverton for breaching Investors' contractual rights in the development of a billion dollar, multi-casino/hotel resort and residential development by contracting with Transcontinental Corporation ("Transcontinental") for the same project, and (b) also from Transcontinental for tortious interference with that contract.

After filing the Complaint, Investors' former counsel learned that Investors was not registered to do business in Nevada, a prerequisite to commencing an action in Nevada state court. Investors' former counsel caused Investors to register and filed a Notice of Dismissal *without prejudice* of this action. Immediately upon the filing of that Notice, former counsel commenced this action by filing the identical Complaint in the same Nevada state court under a new action number. All of this occurred before service was made on any defendant.

On the basis of diversity jurisdiction, this action was removed to the United States District Court for the District of Nevada. Shortly thereafter, Investors' former counsel filed a Notice of Dismissal *without prejudice* as to Transcontinental only. Subsequently, Pacific Malibu closed on the contract for the project with Transneva Limited Partnership, a newly-formed limited partnership whose general partner was Transneva Corporation, a wholly-owned subsidiary of Transcontinental.

Several months later, Investors, represented by new counsel, was granted leave to amend its Complaint to reinstate Transcontinental, and to add Transneva Corporation and Transneva Limited Partnership ("Transneva

Defendants"), as defendants. *Investors had not previously sued either of the Transneva Defendants.*

Transcontinental then moved for summary judgment on the ground of res judicata (claim preclusion), arguing that its dismissal from this action, on top of the earlier dismissal of the original state court action, constituted the second dismissal of an "action" against it and operated as an adjudication upon the merits under the "two dismissal exception" of Fed.R.Civ.P. 41(a)(1), notwithstanding that both Notices of Dismissal were stated to be without prejudice. The Transneva Defendants also moved for summary judgment, arguing that they were entitled to the res judicata protection of Transcontinental's "judgment". Without affording Investors any opportunity to present evidence on the merits of its claims, the District Court granted summary judgment to Transcontinental and the Transneva Defendants.

Investors appealed and, on May 13, 1991, a Panel of the Ninth Circuit held that Transcontinental was entitled to judgment under the "two dismissal exception" of Rule 41(a)(1). (A-23) In analyzing the Transneva Defendants' claimed right to the res judicata effect of that judgment, the Panel rejected the need for privity and ruled it was sufficient that there be a "substantial relationship" with the judgment holder. Applying that new standard, the Panel held that the *Transneva Defendants, even though not privies of Transcontinental,* were entitled to the res judicata protection of *Transcontinental's judgment.* (A-32-33)

Investors petitioned for rehearing on the ground that under *Erie, Nevada law had to be applied and required privity*

to invoke res judicata.[1] The Panel denied rehearing, but amended its Opinion to hold only that a wholly-owned subsidiary of a judgment holder and a limited partnership of which that subsidiary was the general partner could invoke the res judicata benefit of the parent's judgment because they are "substantially the same". (A-36, A-45-46) (Hereinafter, "*Lake at Las Vegas I*"). A petition for writ of certiorari to review a number of questions arising from that decision was denied.

Prior to the rendering of the decision in *Lake at Las Vegas I*, Investors learned in discovery that the party with whom Pacific Malibu had contracted in breach of its agreement with Investors was not Transcontinental, as had been alleged in the Complaint, but a general partnership known as Botaba Realty Company ("Botaba"). The partners of Botaba were BSF Partners, Sid R. Bass, Robert M. Bass and Lee M. Bass (collectively "the Botaba Defendants"), and Transcontinental. Investors therefore sought and was granted leave to amend its Complaint to join the Botaba Defendants.[2] *None of the Botaba Defendants was previously sued by Investors.* The Botaba Defendants then moved to dismiss on the grounds that they, like the Transneva Defendants, should be able to invoke the res judicata effect of Transcontinental's judgment.

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[1] *Sierra Pacific Power Co. v. Craigie*, 738 F. Supp. 1325, 1327-29 (D. Nev. 1990); *Schwartz v. Schwartz*, 95 Nev. 202, 206 n.2, 591 P.2d 1137, 1140 n.2 (1979); *Gilbert v. Warren*, 95 Nev. 296, 301, 594 P.2d 696, 699 (1979); *Paradise Palms Community Assn. v. Paradise Homes*, 89 Nev. 27, 505 P.2d 596, 599 (1973), *cert. denied*, 414 U.S. 865 (1973).

[2] Transcontinental also was rejoined, but its dismissal was not appealed.

The District Court, confusing *defendant* Botaba Realty Company, *a general* partnership, with a totally different entity with a deceptively similar name, Botaba Realty Company *Limited, a limited partnership* ("Botaba Limited Partnership"), granted the motion to dismiss.[3] (A-18-19)

In the appeal *sub judice*, the Ninth Circuit recognized that the District Court erred in considering Botaba Limited Partnership rather than defendant Botaba (A-3 & n.1). However, instead of applying Nevada's requirement of privity (see fn.1 at p. 5, *supra*) and reversing, as required under *Erie*, the Ninth Circuit referred to a general Restatement of Judgment principle *never adopted by Nevada* (and factually inapplicable because Transcontinental originally was sued individually, not as a partner of Botaba) and affirmed the dismissal of the Botaba Defendants. (A-4-5, A-6) Thus, the outcome of the case against the Botaba Defendants, as decided by a federal court sitting in diversity, is diametrically opposite of the result that would have been reached by a Nevada state Court.

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[3] Botaba *Limited* Partnership, which misleadingly was injected into oral argument by counsel for the Botaba Defendants, was formed two years *after* the events at issue in this case, and was not even a party to the case. Because the general partner of that *limited* partnership was a subsidiary of Transcontinental, the District Court, in mistakenly considering that irrelevant entity, saw it as standing in the same position to Transcontinental as did Transneva Limited Partnership in *Lake at Las Vegas I*, and concluded that *Lake at Las Vegas I* required the grant of the motion. (A-18-19)

REASON FOR GRANTING THE WRIT

The decision of the Ninth Circuit raises the following nationally important and recurring issue:

Whether a federal court sitting in a diversity action must apply state law in determining the res judicata effect of a judgment in a prior diversity action. This Court has left that specific issue undecided. The decision in this case adds to the widespread **split and confusion among the Circuits** as to the correct application of the *Erie* doctrine on the issue of res judicata and promotes forum shopping.

There Is A Split And Pervasive Confusion In The Courts Of Appeal On The Issue Of Whether A Federal Court Sitting In A Diversity Action Must Apply State Or Federal Law To Determine The Res Judicata Effect Of A Prior Judgment In A Diversity Action

This Court has never squarely decided whether a federal court in a diversity action must apply state or federal law in determining the res judicata effect of a judgment in a prior diversity action. Supreme Court decisions over the years, however, suggest that state law applies. E.g., *Heiser v. Woodruff*, 327 U.S. 726, 731-32 (1946); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 325 (1971).

The Courts of Appeals, despite years of effort, have been unable to develop a uniform and consistent answer.

At present, the Eighth[4] and Ninth Circuits[5] (before this case) hold that the second court must apply state law principles of claim preclusion. The First,[6] Fourth,[7] Fifth,[8] Sixth,[9] Seventh,[10] and Eleventh[11] Circuits hold that federal law of claim preclusion applies. In the Second,[12]

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[4] E.g., *Follette v. Wal-Mart Stores, Inc.*, 41 F.3d 1234 (8th Cir. 1994), *cert. denied*, 116 S.Ct. 66 (1995); *Lane v. Sullivan*, 900 F.2d 1247, 1249-50 (8th Cir. 1990), *cert. denied*, 498 U.S. 847 (1990).

[5] E.g., *Washington Public Power Supply System v. Pittsburgh-Des Moines Corp.*, 876 F.2d 690, 699 (9th Cir. 1989); *Northwest Acceptance Corp. v. Lynnwood Equipment, Inc.*, 841 F.2d 918, 926 (9th Cir. 1988); *A.V. Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir. 1982), *cert. denied*, 459 U.S. 1087 (1982).

[6] E.g., *Apparel Art Int'l, Inc. v. Amertex Enterprises Ltd.*, 48 F.3d 576 (1st Cir. 1995).

[7] E.g., *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1179 (4th Cir. 1989).

[8] E.g., *Smith v. Safeco Insurance Co.*, 863 F.2d 403, 404 (5th Cir. 1989); *Stovall v. Price Waterhouse Co.*, 652 F.2d 537 (5th Cir. 1981).

[9] E.g., *J.Z.G. Resources, Inc. v. Shelby Insurance Co.*, 84 F.3d 211, 213-14 (6th Cir. 1996).

[10] E.g., *Havoco of America, Ltd. v. Freeman, Atkins & Coleman, Ltd.*, 58 F.3d 303 (7th Cir. 1995); *Reinke v. Boden*, 45 F.3d 166, 170 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 74 (1995).

[11] E.g., *Citibank, N.A. v. Data Lease Financial Corp.*, 904 F.2d 1498 (11th Cir. 1990).

[12] E.g., *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 345 n.1 (2d Cir. 1995).

Third,[13] Tenth,[14] and District of Columbia Circuits,[15] the issue still is unsettled. The confusion is compounded by Circuits switching positions.[16]

The res judicata law applied can be case dispositive, as it was in this case. Having a difference in result depending on whether suit is brought in state court or a federal court sitting in diversity is exactly what the *Erie* doctrine was meant to foreclose, and promotes forum shopping. This confusion has existed for an extended period of time, resulting in untold litigants having, and continuing to have, their cases disposed of without a fixed and guiding principle of law.

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[13] E.g., *Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 962 & n.2 (3d Cir. 1991); *Collins v. E.I. Dupont De Nemours & Co.*, 34 F.3d 172 (3d Cir. 1994) (applying state preclusion law, without discussion).

[14] E.g., *Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354, 359 & n.4 (10th Cir. 1996) (noting "some confusion"); *Frandsen v. Westinghouse Corp.*, 46 F.3d 975, 977 & n.1 (10th Cir. 1995).

[15] E.g., *U.S. Industries, Inc. v. Blake Construction Co., Inc.*, 765 F.2d 195, 204 n.20 (D.C. Cir. 1985).

[16] E.g., *Havoco of America, Ltd. v. Freeman, Atkins & Coleman, Ltd.*, 58 F.3d 303, 307 n.7 (7th Cir. 1995); *Frandsen v. Westinghouse Corp.*, 46 F.3d 975, 977 n.1 (10th Cir. 1995); *Answering Service, Inc. v. Egan*, 728 F.2d 1500, 1505-06 (D.C. Cir. 1984).

Certiorari should be granted in this case to settle and restore uniformity to this important and case dispositive issue.

Respectfully submitted,

BRUCE W. KAUFFMAN
(Counsel of Record)
CARL H. HANZELIK
VIRGINIA H. MCMICHAEL
DILWORTH, PAXSON, KALISH & KAUFFMAN
3200 Mellon Bank Center
1735 Market Street
Philadelphia, Pennsylvania 19103

BARRY L. LIEBERMAN
DICKERSON, DICKERSON, LIEBERMAN & CONSUL
Suite 1130, The Phoenix Building
330 South Third Street
Las Vegas, Nevada 89101

Attorneys for Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAKE AT LAS VEGAS INVESTORS GROUP, INC., Plaintiff-Appellant, v. PACIFIC MALIBU DEVELOPMENT CORP., et al., Defendants, BOTABA REALTY COMPANY, BSF PARTNERS, SID R. BASS, ROBERT M. BASS, and LEE M. BASS, Defendants-Appellees.	No. 94-16054 D.C. No. CV 87-00768-PMP MEMORANDUM* (Filed Feb. 23, 1996)

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted November 17, 1995
San Francisco, California

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* This disposition is not suitable for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: WALLACE, Chief Judge, and LEAVY, Circuit Judges, and BAIRD,** District Judge.

Lake at Las Vegas Investors Group, Inc. ("Investors") appeals the district court's dismissal of five defendants. The district court based its dismissal on the res judicata bar pursuant to the rule that two voluntary dismissals under Rule 41(a)(1)(i) operate as an adjudication on the merits. We affirm.

Appellant challenges our prior holding in *Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Dev. Corp.*, 933 F.2d 724 (9th Cir. 1991) *cert. denied*, 503 U.S. 920 (1992) (hereinafter *Lake at Las Vegas I*). "It is well established, however, that a panel not sitting en banc may not overturn Ninth Circuit precedent." *United v. Garza*, 980 F.2d 546 (9th Cir. 1992).

Lake at Las Vegas I addressed the question, "what relationship, if any, is required between the party twice dismissed and a party seeking to enforce the Rule 41(a)(1) bar against the plaintiff." *Lake at Las Vegas*, 933 F.2d at 728. The court held that if the relationship between the dismissed defendants and the new defendants is sufficient to render them "substantially the same," the new defendants may also assert the Rule 41 bar. *Id.* The Court found that a wholly-owned subsidiary and partnership in

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** The Honorable Lourdes G. Baird, United States District Judge for the Central District of California, sitting by designation.

which that subsidiary was the general partner were substantially the same as and could invoke the two dismissals of the subsidiary's parent and claim Rule 41(a)(1) res judicata. *Id.*

In the instant appeal, the named party originally dismissed twice under Rule 41 was Transcontinental Corporation ("Transcontinental") acting in its capacity as general partner of Botaba Realty ("Botaba"). The five defendants dismissed by the district court in this action were Botaba, BSF Partners, Sid R. Bass, Robert M. Bass, and Lee M. Bass ("Bass brothers"). The Fourth Amended Complaint states a cause of action against Defendants BSF Partners and the Bass brothers only to the extent that they may be jointly and severally liable as general partners of Botaba. Therefore, the analysis need only focus on Botaba.

Investors brings the same claims of tortious interference with contractual relations against Botaba as it did against Transcontinental in its earlier complaints. The question is whether Botaba can enforce the Rule 41 bar against Investors. Therefore, the standard set in *Lake at Las Vegas I* applies.

Appellant argues that even if the standard "substantially the same" applies, Botaba does not meet it because Botaba was not a limited partnership at the time of the alleged wrongdoing. Appellant Investors is correct that Botaba should be considered a general partnership for the present review; not a limited partnership.[1] However, this

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[1] Botaba was formed in 1981 as a general partnership. The two prior dismissals of Transcontinental occurred in 1987. These

distinction does not change the conclusion that Botaba is substantially the same as Transcontinental for purposes of the Rule 41 bar.

Botaba was a general partnership whose partners included Transcontinental and BSF Partners. Botaba's liability is premised upon its allegedly wrongful act as a partnership conducted through its general partner Transcontinental. Transcontinental was a general partner against which previous complaints in this case were twice filed and dismissed.

Under Nevada law a partnership is liable for a partner's wrongful act committed in the ordinary course of the business of the partnership or with the authority of his copartners. Nev. Revised Stat. § 87.130 (1991).

"[A] judgment in an action by an injured person against a partner upon an obligation or liability incurred in the course of partnership business, . . . *if against the injured person,* terminates his claim against another partner based upon that obligation." Restatement (Second) of Judgments § 60(1)(a) (1982) (emphasis added). "It is now universally recognized that a third person who suffers adverse judgment in an action against one partner on a partnership obligation is barred from bringing an action against other partners on the claim." *Id.* at Reporter's Note p. 116.

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dismissals represent the judgment that provides the basis for the res judicata defense. The time of the prior judgment is the point at which the relationship of the parties should be examined. *Nordhorn v. Ladish Co., Inc.*, 9 F.3d 1402, 1405 (9th Cir. 1993). Therefore, at the relevant time, 1987, Botaba was a general partnership.

Investors suffered an adverse judgment in its action against Transcontinental in its capacity as general partner of Botaba. The dismissed parties are the partnership and other partners. We conclude on these facts that the dismissed parties meet the "substantially the same" standard for application of the Rule 41(a) bar by related entities.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAKE AT LAS VEGAS INVESTORS GROUP, INC. Plaintiff-Appellant, -vs- PACIFIC MALIBU DEVELOPMENT CORPORATION; TRANSCONTINENTAL CORPORATION; TRANSNEVA CORPORATION; TRANSNEVA LIMITED PARTNERSHIP; BOTABA REALTY CO., et al., Defendants-Appellees.	No. 94-16054 D.C. No. CV-87-00768-PMP ORDER AMENDING MEMORANDUM AND DENYING REHEARING (Filed Apr. 9, 1996)

Before: WALLACE and LEAVY, Circuit Judges, and BAIRD,* District Judge.

The memorandum disposition, filed February 23, 1996, is amended as follows:

At page 4, delete first sentence of third full paragraph ("Investors suffered . . . Botaba.") and substitute the following: "Investors suffered an adverse judgment in its action against Transcontinental for its conduct in transacting business as a general partner of Botaba."

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* Honorable Lourdes G. Baird, United States District Judge, Central District of California, sitting by designation.

With the above amendment, the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

LAKE AT LAS VEGAS INVESTORS GROUP, INC., Plaintiff, v. PACIFIC MALIBU DEVELOPMENT CORPORATION, et al., Defendants.	CV-S-87-768-PMP (RLH) ORDER

On December 16, 1993, this case was reassigned to the undersigned for all further proceedings. Presently before this Court is a Motion to Dismiss Plaintiff's Fourth Amended Complaint (# 244), filed on July 2, 1990, by Defendants Transcontinental Corp., Transneva Corp., Transneva Limited Partnership (hereinafter collectively referred to as the "Trans Defendants"), and Botaba Realty Company, BSF Partners, Sid R. Bass, Robert M. Bass, Lee M. Bass, and Ronald Boeddeker (hereinafter collectively referred to as the "Non-Trans Defendants"). Plaintiff Lake at Las Vegas Investors Group, Inc. ("Investors") filed an Opposition (#246) on July 24, 1990, and Defendants filed a Reply (#250) on August 20, 1990.

Also before the Court is Plaintiff's Motion to File Additional Reply (# 282), filed on April 2, 1992. Defendants filed their Opposition (# 283) on April 20, 1992, and Plaintiff filed its Reply (# 284) on May 5, 1992.

On March 4, 1994, the Court conducted a hearing regarding the foregoing motions.

In 1987, Plaintiff Investors, a Delaware Corporation, allegedly entered into an agreement with Defendants Pacific Malibu ("Malibu") and Barry Silverton ("Silverton"), wherein Malibu and Silverton agreed to use their best efforts to arrange for Investors to purchase approximately 2,180 acres of land in Henderson, Nevada. For its part, Investors agreed to produce a "bona fide financing commitment" for the purchase of the land. Investors agreed that it would purchase the land for $11,600,000, and if Malibu and Silverton could arrange for a lower purchase price, it was agreed that Malibu and Silverton would keep the difference as a fee.

Investors alleges that Malibu and Silverton, in violation of the agreement and in breach of their fiduciary duties, failed to timely secure the purchase of the land, and, secretly and deceitfully, negotiated and contracted with Defendants Transcontinental Corp., Botaba Realty Company ("Botaba"), and general partners of Botaba, to acquire the land for the benefit of themselves and Botaba. Investors also alleges that the Trans Defendants, Botaba, BSF Partners, Sid R. Bass, Robert M. Bass, Lee M. Bass, Boeddeker and Lake at Las Vegas Joint Venture, while having actual notice of the agreement between Investors and Malibu/Silverton, tortiously interfered with said

agreement by contracting to acquire the Henderson land for themselves.[1]

The procedural history of this case is more complicated than the facts that give rise to the substantive allegations. Plaintiff filed its first complaint in state court against Malibu, Silverton, and Transcontinental Corp. on October 9, 1987. Plaintiff then voluntarily dismissed this case, pursuant to Nev. R. Civ. P. 41(a) on October 15, 1987, but filed an amended complaint the next day. Malibu and Silverton removed this second complaint to federal court. On November 10, 1987, Plaintiff voluntarily dismissed this second action.

The same day, November 10, 1987, Plaintiff filed a Motion to Amend the Complaint. The Motion to Amend indicated that Plaintiff wished to withdraw all of its claims against Defendant Transcontinental Corp., and to remove its claims for specific performance, declaratory relief, and its request for a Temporary Restraining Order/ Preliminary Injunction. On November 13, 1987, United States District Judge Roger Foley granted Plaintiff's Motion to Amend the Complaint (Minute Order at # 26).

On April 4, 1988, Plaintiff filed a second Motion to Amend the Complaint, to once again name Transcontinental, and add Transneva Corp. and Transneva Limited Partnership, as Defendants. Judge Foley, on April 26, 1988, granted Plaintiff's Motion to Amend Complaint (#

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[1] Investors also alleges that these Defendants induced a breach of Malibu/Silverton's fiduciary duties, and states a claim of joint and several liability against the general partners of Botaba for any amounts for which Botaba is found liable.

54), and permitted Plaintiff to file a Third Amended Complaint (# 58). These Defendants moved to dismiss this Third Amended Complaint on res judicata grounds. On October 28, 1988, Judge Foley granted Defendants' Motion to Dismiss (# 86), holding that the November 10, 1987, voluntary dismissal in Federal Court operated as a dismissal on the merits, pursuant to Fed. R. Civ. P. 41(a), because Plaintiff had voluntarily dismissed its state court action.[2] By this Order, Judge Foley dismissed Defendants Transcontinental Corp., Transneva Corp., and Transneva Limited Partnership.

On March 30, 1989, Judge Foley denied Plaintiff's Motion for Reconsideration of this Order (# 86). On October 5, 1989, Judge Foley granted (# 171) Transcontinental Corp.'s Motion to Certify the Order (# 86) as final, pursuant to Fed. R. Civ. P. 54(b), and on November 13, 1989, certified the judgment as final (# 189).

Plaintiff appealed Judge Foley's dismissal Order (# 86) to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit issued its first opinion on May 13, 1991, affirming Judge Foley's dismissal. Apparently in response to Plaintiff's Petition for Rehearing and Suggestion for Rehearing En Banc, the Ninth Circuit issued an Amended Order on August 23, 1991. This amended Order is published at *Lake of Las Vegas Investors Group, Inc. v. Pacific Malibu Development Corp.*, 933 F.2d 724 (9th Cir. 1991). The amended Order made only minor changes, and

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[2] See Rule 41 ("a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim").

did not affect the judgment of the Ninth Circuit to affirm Judge Foley's Order (# 86). The Ninth Circuit denied Plaintiff's Petition for Rehearing and rejected its suggestion for rehearing en banc. The Supreme Court denied Plaintiff's Petition for a Writ of Certiorari at 112 S. Ct. 1295 (1992).

On May 22, 1990, pursuant to an Order granting it leave to add additional Defendants (# 231), Plaintiff filed a Fourth Amended Complaint, in which it renamed the Trans Defendants, and in which it added Botaba Realty Co., BSF Partners, Sid R. Bass, Robert M. Bass, Lee M. Bass, and Ronald Boeddeker (the Non-Trans Defendants) as newly named Defendants.

Defendants' present Motion to Dismiss Plaintiff's Fourth Amended Complaint (# 244) raises the same issue that was discussed in Judge Foley's Order (# 86) and affirmed on appeal.[3] Specifically, the question, as phrased by the Ninth Circuit, is "what relationship, if any, is required between the party twice dismissed and a party seeking to enforce the bar against the plaintiff." *Lake at Las Vegas*, 933 F.2d at 728. Here, Defendants Botaba Realty Co., BSF Partners, Sid R. Bass, Robert M. Bass, Lee M. Bass (hereinafter referred to as the "Bass brothers"), and Ronald Boeddeker, as well as Transcontinental Corp., Transneva Corp., and Transneva Limited Partnership, seek to rely upon the dismissal of Transcontinental Corp., Transneva Corp., and Transneva Limited Partnership in

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[3] As a result of the Ninth Circuit Opinion, Plaintiff has moved for Leave to File Additional Reply (# 282). Defendants filed an Opposition to this Motion (# 283), and Plaintiff filed its Reply (# 284).

Judge Foley's March 30, 1989, Order (# 86). Defendants argue that the doctrine of res judicata, applicable pursuant to Fed. R. Civ. Pro. 41(a)(1), warrants the dismissal of Plaintiff's Fourth Amended Complaint, because the relationship between the moving Defendants and the Trans Defendants who were dismissed by Judge Foley permits the application of Rule 41(a)(1).

Plaintiff argues that the two dismissal rule of Rule 41(a)(1) should not be applied here because it contends that the relationship between the moving Defendants and the Trans Defendants is not sufficiently close to warrant the application of the Rule. Plaintiff further argues that even if the relationship between the Trans and Non-Trans Defendants warrants the application of the two-dismissal bar, the claims asserted against the Trans Defendants in the Third Amended Complaint are different from the claims asserted against the non-Trans Defendants in the Fourth Amended Complaint.[4] Thus, Plaintiff argue that Rule 41(a), which by its own terms bars only cases involving the same claims asserted in a prior dismissed action, should not be applied to its Fourth Amended Complaint, no matter what the relationship between the Trans Defendants and the Non-Trans Defendants.

Finally, Plaintiff argues that res judicata should not bar its Fourth Amended Complaint, because it was only

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[4] Plaintiff also asserts that the claims asserted against the Trans Defendants in the Third Amended Complaint are different than the claims asserted against those same Trans Defendants in the Fourth Amended Complaint. Thus, Plaintiff contends that the two-dismissal bar of Rule 41 should not be applied even to the Trans Defendants.

after it had discovered new information in 1989 that it became aware of the potential liability of Botaba, the Bass brothers, and BSF Partners.[5] Thus, Plaintiff concludes that res judicata will not bar unknown or concealed claims, and that the factual bases for the claims asserted in the Fourth Amended Complaint were only discovered in September, 1989, *after* Judge Foley had issued his October 28, 1988, Order (# 86) dismissing Plaintiff's Third Amended Complaint.[6]

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[5] Plaintiff argues that in September, 1989, it first discovered that a general partnership, Botaba Realty Company, had been the party that contracted with Malibu, allegedly interfering with the Plaintiff's agreement with Malibu. On October 11, 1989, Plaintiff moved the Court to grant it leave to add Botaba and its general partners (the three Bass brothers, BSF Partners, Transcontinental, and Ronald Boeddeker, hereinafter referred to as the "Botaba Defendants") as Defendants, and on May 15, 1990, Judge Foley granted Plaintiff's Motion (# 229 and amended Order, dated May 22, 1990, at # 231). Plaintiff thereafter filed its Fourth Amended Complaint to reflect the additional parties. Plaintiff contends that when Judge Foley granted its Motion to Add Defendants, he implicitly rejected Defendants' arguments, proffered in their Opposition to Plaintiff's Motion to Add Parties (oppositions at ## 187, 188, 192), that res judicata barred the additional defendants.

[6] Plaintiff also refers to Federal Rule 60(b), which permits a court to relieve a party from judgment on the basis of newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial. Plaintiff argues that since a court may relieve a party from judgment in the face of newly discovered evidence, such new evidence also must bar the application of claim preclusion.

I. The Claims Against the Trans Defendants

After a review of both the Third Amended Complaint (# 58) and the Fourth Amended Complaint (# 230), the Court finds that the claims against the Trans Defendants are the same in both Complaints. Count Eight in the Third Amended Complaint states a claim against the Trans Defendants for tortiously interfering with the contractual and business relations between Plaintiff and Pacific Malibu and Silverton. Count Eight in the Fourth Amended Complaint, though more detailed, essentially states the same cause of action, arising out of the same conduct. Count Nine in the Third Amended Complaint states a cause of action against the Trans Defendants for aiding, abetting, and inducing Pacific Malibu and Silverton to breach their fiduciary duties to Plaintiff. Count Nine in the Fourth Amended Complaint as stated against the Trans Defendants is virtually identical to Count Nine in the Third Amended Complaint. Thus, the Court finds that the claims against the Trans Defendants in the Third Amended Complaint are the same as the claims against the Trans Defendants in the Fourth Amended Complaint.

II. The Claims Against the Non-Trans Defendants

Before deciding whether the relationship between the Trans and Non-Trans Defendants warrants the application of the Rule 41 bar, the Court must first determine if the claims against the Trans Defendants in the Third Amended Complaint are the same as the claims against the Non-Trans Defendants in the Fourth Amended Complaint. This analysis is necessary because Rule 41(a) only applies to claims brought in a complaint where those

claims are the same as the claims which were brought in an earlier case which was dismissed.

The Court finds that Counts Eight and Nine in the Fourth Amended Complaint state the same causes of action against the Non-Trans Defendants as were stated against the Trans Defendants in Counts Eight and Nine of the Third Amended Complaint.[7] Both Complaints state a claim against the Defendants for interference with contractual and business relations, and for aiding and abetting in the breach of fiduciary duties. The only difference between the two Complaints with regard to these Defendants is that the earlier Complaint did not name the Non-Trans Defendants, presumably because Plaintiff was unaware of their existence at that time.[8]

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[7] Count Ten in the Fourth Amended Complaint names BSF Partners, the Bass brothers, and Boeddeker as jointly and severally liable for any liability of Botaba. Thus, this is not a separate substantive allegation.

[8] Plaintiff argues that because it was unaware of the existence of the Non-Trans Defendants and of their participation in the alleged activities, res judicata should not be applied to bar claims against those Defendants. Rule 41(a)(1) provides that where the claims in a prior proceeding which has been voluntarily dismissed are the same as the claims in a subsequent proceeding also voluntarily dismissed, the second dismissal operates as an adjudication on the merits of those claims. Thus, there appears to be only two inquiries in applying this rule to a defendant in a third suit who was not a defendant in the first two suits. First, were the claims in the second action the same as the claims in the first action, and if so, are the claims in the third action the same as the claims in the first and second cases, and second, does the relationship between the defendant in the third action and the defendants in the first and second actions warrant the application of the Rule.

III. The Fourth Amended Complaint Must Be Dismissed Against the Trans Defendants

It is clear that Judge Foley's dismissal of Plaintiff's Third Amended Complaint operated as an adjudication on the merits of the claims in that Complaint. Thus, as the Court has found that the claims against the Trans Defendants in the Third Amended Complaint are the same as the claims asserted against those Defendants in the Fourth Amended Complaint, res judicata bars the claims against the Trans Defendants in the Fourth Amended Complaint. Therefore, the Court will dismiss Counts Eight and Nine of the Fourth Amended Complaint.

IV. The Fourth Amended Complaint Must Be Dismissed Against the Non-Trans Defendants

As the Court has already found that the claims asserted in the Third and Fourth Amended Complaints are the same, Rule 41(a)(1) will bar the claims against the Non-Trans Defendants in the Fourth Amended Complaint if the Trans Defendants and the Non-Trans Defendants are "substantially the same."[9] *Lake at Las Vegas*, 933 F.2d at 728.

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[9] There is a disagreement between the parties as to what relationship must exist between a defendant twice dismissed and a different defendant seeking to enforce Rule 41(a)(1) against the plaintiff. Plaintiff argues that in the Ninth Circuit's August 23, 1991, amendment to its original Opinion, issued May 13, 1991, the Ninth Circuit changed "the very point in its original Opinion that Defendants . . . had argued was determinative of the pending Motion to Dismiss the Fourth Amended Complaint." (Motion # 282 at 3). Plaintiff's Reply, filed attached to its Motion (# 282), argues that the proper test of

The Ninth Circuit's ruling in *Lake at Las Vegas* did not "define the exact parameters" of the Rule 41(a)(1) test, holding only that the relationship between a defendant twice dismissed and a defendant seeking to enforce the Rule 41 bar against the plaintiff must be such that the two defendants are substantially the same. In that case, the court dealt with a wholly-owned subsidiary and a partnership in which that subsidiary was the general partner, and it held that those two entities "may invoke the two dismissals of the subsidiary's parent and claim Rule 41(a) res judicata." *Lake at Las Vegas*, 933 F.2d at 728.

In order to decide whether to apply Rule 41 to the Non-Trans Defendants, the Court must analyze the relationships between the Trans and the Non-Trans Defendants to determine if they are substantially the same for purposes of Rule 41.

It is clear that Defendant Botaba Realty may utilize the Rule 41(a)(1) bar. Botaba is a partnership whose general partner is Transcontinental Properties, which itself is a wholly owned subsidiary of Transcontinental Corp., one of the trans Defendants. Thus, Botaba stands in the same position as Transneva Limited Partnership, one of

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whether to apply res judicata to the Non-Trans Defendants is whether those Defendants are "substantially the same" as the Trans Defendants.

Defendants respond by arguing that the Ninth Circuit's amended Opinion did not change the "thrust of the claim preclusion test." Defendants cite to the Amended Opinion, and note that the instant Motion to Dismiss presents this Court with the issue of whether the newly named Defendants bear the type of relationship sufficiently close to the Trans Defendants to warrant the application of claim preclusion.

the defendants in the *Lake at Las Vegas* case which the Ninth Circuit permitted to use Rule 41(a)(1)'s bar.[10] Thus, Botaba is substantially the same as the Trans Defendants, and should be dismissed.

It is also clear that Ronald Boeddeker, as the 100% owner of Transcontinental Corp., is substantially the same as the twice dismissed Trans Defendants, and should be permitted to use the Rule 41(a)(1) bar.

Plaintiff's Fourth Amended Complaint states a cause of action against Defendants BSF Partners and the Bass brothers only to the extent that those Defendants may be jointly and severally liable for the misdeeds of the organizations involved.[11] Thus, because those organizations either have not been named as a defendant or have been dismissed, it is appropriate to dismiss BSF Partners and the Bass brothers from the Fourth Amended Complaint.

IT IS THEREFORE ORDERED THAT Defendants' Motion to Dismiss (# 244) is granted.

IT IS FURTHER ORDERED THAT the Parties' various requests for Oral Argument (## 244 & 246) are denied.

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[10] The Ninth Circuit noted that Transneva Limited Partnership was the partnership in which a wholly owned subsidiary (Transneva Corp.) of the twice dismissed defendant (Transcontinental Corp.) was the general partner. Here, Botaba is a partnership in which a wholly owned subsidiary (Transcontinental Properties) of a twice dismissed defendant (Transcontinental Corp.) is the general partner.

[11] BSF Partners is a limited partner in Botaba Realty. The Bass brothers themselves are partners in BSF Partners, and are general partners in Transcontinental Land Company, which itself is a limited partner in Transneva Limited Partnership.

IT IS FURTHER ORDERED THAT Plaintiff's Motion to File Additional Reply (# 282) is granted.

DATED: March 17, 1994

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

LAKE AT LAS VEGAS INVESTORS GROUP, INC., Plaintiff, v. PACIFIC MALIBU DEVELOPMENT CORPORATION, et al., Defendants.	CV-S-87-768-PMP (RLH) ORDER (Filed May 13, 1994)

On March 18, 1994, this Court entered an Order (#298) granting Defendants' Motion to Dismiss Plaintiff's Fourth Amended Complaint (#244).

On March 24, 1994, Defendants filed a Motion to Certify Judgment as Final (#299) pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

On March 28, 1994, Plaintiff filed a Motion for Reconsideration of this Court's Order granting the Motion to Dismiss (#300).

The foregoing Motions have been fully briefed including the filing of a Motion for Leave to File a Sur-Reply on behalf of Plaintiff (#306), and Defendants' Request that Pending Motion Be Deemed Submitted (#307).

IT IS THEREFORE ORDERED that Plaintiff's Motion for Leave to File a Sur-Reply (#306) and Defendants' Request that Pending Motion be Deemed Submitted (#307) are granted.

IT IS FURTHER ORDERED that Plaintiff's Motion for Reconsideration (#300) is denied.

IT IS FURTHER ORDERED that Defendants' Motion to Certify Judgment as Final Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure (#299) is granted.

The Court finding that there is no just reason for delay in the entry of Final Judgment as to all claims set forth in Plaintiff's Fourth Amended Complaint against Defendants Transcontinental Corporation, Transneva Corporation, Transneva Limited Partnership, Botaba Realty Company, BSF Partners, Sid R. Bass, Robert M. Bass, Lee M. Bass, and Ronald F. Boeddeker, and good cause appearing,

IT IS FURTHER ORDERED that the Clerk of Court is directed to enter Final Judgment in favor of the above-referenced Defendants and against Plaintiff on all claims disposed of by Defendants' Motion to Dismiss Plaintiff's Fourth Amended Complaint which was granted by this Court in its Order (#289) entered March 19, 1994.

DATED: May 13, 1994

/s/ Philip M. Pro
PHILIP M. PRO
United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAKE AT LAS VEGAS INVESTORS GROUP, INC., *Plaintiff-Appellant,* v. PACIFIC MALIBU DEVELOPMENT CORP., et al., *Defendants,* TRANSCONTINENTAL CORP., TRANSNEVA CORP., and TRANSNEVA LIMITED PARTNERSHIP, *Defendants-Appellees.*	No. 89-16496 D.C. No. CV-S-87-768-RDF OPINION

Appeal from the United States District Court
for the District of Nevada
Roger D. Foley, District Judge, Presiding

Argued and Submitted
April 4, 1991 – San Francisco, California

Filed May 13, 1991

Before: Thomas Tang, Jerome Farris and
Dorothy W. Nelson, Circuit Judges.

Opinion by Judge Farris

OPINION

FARRIS, Circuit Judge:

OVERVIEW

Lake at Las Vegas Investors Group, Inc. appeals the district court's dismissal of its action for interference with and breach of contract against Transcontinental Corporation, Transneva Corporation, and Transneva Limited Partnership. The dismissal was pursuant to the rule that two voluntary dismissals under Federal Rule of Civil Procedure 41(a) operate as an adjudication on the merits.

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1332(a)(1). This court has jurisdiction over the timely appeal pursuant to 28 U.S.C. § 1291.

ISSUES

(1) Whether the district court erred in granting Transcontinental's motion to dismiss pursuant to the two dismissal exception of Rule 41(a).

(a) Because Nev. Rev. Stat. § 80.210(1) rendered Investors's first complaint a nullity.

(b) Because Investors's first dismissal was not "voluntary."

(c) Because neither dismissal was for the purpose of harassing transcontinental.

(d) Because Investors's second dismissal was not a dismissal of an "action" within the meaning of Rule 41 since only one defendant was dismissed.

(2) Whether the district court erred in dismissing Transneva Corp. and Transneva Limited Partnership because Investors had not previously dismissed any complaint against them.

(3) Whether the district Court's failure to allow oral argument pursuant to a local rule was prejudicial to Investors.

STANDARD OF REVIEW

A district court's dismissal on res judicata grounds is subject to de novo review. *Guild Wineries & Distilleries v. Whitehall Co.*, 853 F.2d 755, 758 (9th Cir. 1988).

FACTS

On October 9, 1987, Investors filed its first complaint against Pacific Malibu Development Corporation, Barry Silverton, and Transcontinental Corporation alleging that Transcontinental had interfered with and induced the breach of an agreement between Investors and Pacific Malibu and Silverton. On October 15, Investors filed a notice of voluntary dismissal of this complaint pursuant to Nevada Rule of Civil Procedure 41(a)(1) and refiled the same complaint immediately thereafter. Pacific Malibu removed to federal court on diversity grounds.

On November 10, 1987, Investors filed a voluntary dismissal of all claims against Transcontinental pursuant

to Federal Rule of Civil Procedure 41(a)(1). It also moved to amend its complaint against Pacific Malibu and Silverton. On April 4, 1988, Investors moved for leave to add as parties Transcontinental, Transneva Corporation (a wholly owned subsidiary of Transcontinental), Transneva Limited Partnership (in which Transneva Corporation is a general partner), and Lake at Las Vegas Joint Venture.

On October 28, 1988, the district court granted Transcontinental's motion to dismiss Transcontinental and the two Transneva entities pursuant to the two dismissal rule of Rule 41(a)(1) and denied Investors's motion for oral argument. Investors's motion for reconsideration was denied.

DISCUSSION

I. *Applicability of Rule 41(a)*

Rule 41(a) provides that:

> Rule 41. Dismissal of Actions
>
> (a) Voluntary Dismissal: Effect Thereof
>
> (1) By Plaintiff; by Stipulation. . . . [A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United

> States or of any state an action based on or including the same claim.

Fed. R. Civ. P. 41(a). Investors offers several arguments in support of its contention that its two dismissals do not bring it within the operation of the Rule.

A. *Whether Filing in State Court Commenced an "Action"*

Nevada Revised Statute § 80.210(1) provides that foreign corporations "shall not be allowed to commence, maintain, or defend any action or proceeding in any court of the state" until registered to do business in Nevada. Investors argues that because it was not registered when it filed its first state court complaint, the complaint did not commence an action within the meaning of Rule 41(a), but rather was a "nullity" by operation of section 80.210(1). Therefore, it argues, its motion to dismiss under Rule 41(a) was not a voluntary dismissal of an action since an action never existed.

Nevada law does not provide a clear answer to this ingenious argument. *Compare League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 93 Nev. 270, 275, 563 P.2d 582, 585 (1977) (complaint filed by unregistered corporation is subject to dismissal even if the corporation later complies with 80.210(1) and does not toll statute of limitations) *and Bader Enterprises, Inc. v. Olsen*, 98 Nev. 381, 383, 649 P.2d 1369, 1370 (1982) (using the term "jurisdiction" when discussing section 80.210(1)) *with Harmon v. Telerent Leasing Corp.*, 93 Nev. 186, 187, 561 P.2d 1340, 1341 (1977) (referring to 80.210(1) as an affirmative defense) *and Marshall Earth Resources, Inc. v. Parks*, 99 Nev. 251, 252,

661 P.2d 875, 876 (1983) (plaintiff who sues an unregistered foreign corporation waives the issue of registration). Lack of capacity to sue is an affirmative defense in other contexts, *see Shaw v. Stutchman*, 105 Nev. Adv. Op. 27, 771 P.2d 156, 159 (1989), and an "action" is deemed commenced by the filing of a complaint under Nevada Rule of Civil Procedure 3. We reject Investors's argument. We hold that although the complaint may have been subject to dismissal, Investors commenced an "action" that could be and was voluntarily dismissed under Rule 41(a).

B. *Voluntariness of First Dismissal*

Investors next argues that, even if it did commence an "action" within the Rule, its first dismissal was not "voluntary." It bases this argument on the fact that its action would have been subject to dismissal under Nevada Revised Statute § 80.210(1). It urges us to hold that voluntary dismissal of a complaint subject to dismissal is no different than having the complaint dismissed by an order of the court.

In *Randall v. Merrill Lynch*, 820 F.2d 1317 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988), the D.C. Circuit explained:

> The term "voluntary" in Rule 41 means that the party is filing the dismissal without being compelled by another party or the court. In other words, it does not mean that other circumstances might not have compelled the dismissal or that the party desired it.

Id. at 1321. We find the D.C. Circuit's reasoning sound. Rule 41 distinguishes between voluntary, or section (a), dismissals and involuntary, or section (b), dismissals on the basis of which party initiates the dismissal. And, while it delineates the bases upon which the defendant may seek an involuntary dismissal, it does not consider the plaintiff's reasons for seeking a voluntary dismissal.

Further, there were alternatives to filing for voluntary dismissal. If Investors had allowed the defendants to move for a dismissal, it would have been without prejudice under Nevada law if Investors had complied with section 80.210 before the dismissal and the statute of limitations had not run. *See Atlantic Commercial Dev. Corp. v. Boyles*, 103 Nev. 35, 37, 732 P.2d 1360, 1362 (1987). In addition, Investors could have registered and then filed a motion with the court to have its case voluntarily dismissed pursuant to Rule 41(a)(2). *See Sutton Place Dev. Co. v. Abacus Mortgage Inv. Co.*, 826 F.2d 637, 640 (7th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988).

The Nevada Supreme Court's interpretation of voluntariness in *Hiles Co. v. Johnston Pump Co.*, 93 Nev. 73, 77, 560 P.2d 154, 156 (1977), does not control. *Hiles* involved a statutory savings clause that allowed certain U.C.C. actions to be recommenced within six months unless the prior dismissal was due to "voluntary discontinuance" or failure to prosecute. The Nevada court found that the plaintiff's stipulated dismissal without prejudice was not a "voluntary discontinuance" because the plaintiff was motivated by its failure to name the proper party defendant. We decline to apply that analysis in the different context of Rule 41.

C. *Whether Rule 41(a)'s Two Dismissal Exception Requires Actual Intent to Harass*

Investors also argues that the two dismissal exception should not be applied if the dismissals were not for the purpose of harassing or abusing the defendants. The Rule does not require an inquiry into the circumstances of the two dismissals. However, a few cases have suggested that, in certain limited circumstances, the Rule will not be literally applied. In *Poloron Prod., Inc. v. Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012, 1017-18 (2d Cir. 1976), the Second Circuit held that the two dismissal bar of Rule 41(a) does not apply where one of the prior voluntary dismissals was by stipulation knowingly consented to by all parties. The court acknowledged that Rule 41(a) does not distinguish between unilateral and stipulated voluntary dismissals, but held that a stipulated voluntary dismissal posed little danger of harassment and therefore should not bar an otherwise proper suit. *Id.* at 1017. The court observed that the defendant could have declined to agree to the dismissal or could have insisted that it be with prejudice. *Id.* This holding, when followed, has been limited to its facts and does not preclude application of the bar where the voluntary dismissal is unilateral. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Randall*, 110 F.R.D. 499, 500 (E.D. Cal. 1986); *but see Island Stevedoring, Inc. v. Barge CCBI*, 129 F.R.D. 430, 432 (D.P.R. 1990).

Sutton Place Dev. Co. v. Abacus Mortgage Inv. Co., 826 F.2d 637, 640-41 (7th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988), also cited by Investors, held that a dismissal *by motion* (i.e., a dismissal falling outside of the language of

Rule 41(a)(1)) would not be considered for purposes of the two dismissal bar, because to do so would expand the exception to the rule that voluntary dismissals are without prejudice. *Sutton Place* limits an expansion of Rule 41(a)(1), but it hardly suggests that dismissals which fall *squarely within the language of the Rule* should be read out of it via an intent inquiry.

D. *Whether a Dismissal Must be of All Defendants*

Investors contends that under *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105 (2d Cir. 1953), *cert. denied*, 345 U.S. 964, its second dismissal was not a dismissal for Rule 41(a)(1) purposes because it dismissed only Transcontinental, and dismissal of an "action" occurs only when all defendants are dismissed.

Rule 41(a) may be invoked to dismiss less than all of the parties. *See, e.g., Wakefield v. Northern Telecom, Inc.*, 769 F.2d 109, 114 n.4 (2d Cir. 1985) (noting that *Harvey Aluminum*, 203 F.2d 105, is against the weight of authority); *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 194-95 (5th Cir. 1980); 5 J.W. Moore, J.D. Lucas, & T.S. Currier, *Moore's Federal Practice* § 41.06-1, at 41-84 to 41-89 (2d ed. 1988). We need not decide whether a Rule 41(a)(1) dismissal of less than all parties should be sufficient in every instance to trigger the two dismissal bar. We hold only that upon these facts, the Rule applies.

II. *Applicability of Dismissal to Transneva Entities*

Investors argues that even if the dismissal of Transcontinental was proper under the two dismissal bar,

Transneva Corporation and Transneva Limited Partnership were never dismissed and therefore can not claim the benefit of the bar. The question is what relationship, if any, is required between the party twice dismissed and a party seeking to enforce the bar against the plaintiff.

Investors argues that privity is required. We recognize that *Manning v. South Carolina Dept. of Highway & Public Transp.*, 914 F.2d 44, 48 (4th Cir. 1990), invoked privity in its analysis, but we reject the argument for a strict privity requirement. Nevertheless, we agree with Investors that the weight of authority requires at least a relationship between the dismissed party and the party seeking to claim the benefit of the bar. *See, e.g.*, 9 C. Wright & A. Miller, *Federal Practice & Procedure* § 2368, at 190 (1971 & Supp. 1990) (unrelated parties should not be allowed to claim the benefit of Rule). The case relied upon by the Transneva defendants, *City of Raleigh v. College Campus Apartments*, 94 N.C. App. 280, 284-85, 380 S.E.2d 163, 166 (1989) (interpreting state rule identical to Rule 41(a)(1)), *aff'd*, 326 N.C. 360, 388 S.E.2d 768 (1990), is not to the contrary. While the court stated that no "same defendant" requirement should be read into the Rule, it also recognized that, as a factual matter, the defendant seeking to enforce the bar was "substantially the same" as the defendant dismissed; he was the sole shareholder and registered agent of the dismissed corporate defendant and had been named in the second dismissed action.

Privity, in its traditional sense, is absent, but the relationship between Transcontinental and the two Transneva defendants is substantial. As in *City of Raleigh*, the plaintiff named the wrong, but closely related, entity. We need not define the precise parameters of the applicable

test. We hold only that the wholly-owned subsidiary and partnership in which that subsidiary is the general partner may invoke the rights of the subsidiary's parent for purposes of Rule 41(a)(1) res judicata. Investors's error is typical of the type of error motivating voluntary dismissals under Rule 41(a)(1). As a practical matter, the danger of harassment to the parent continued when the closely related Transneva entities were sued.

III. *Oral Argument*

Investors argues that the district court's failure to grant its request for oral argument requires reversal.

District of Nevada Local Rule 140-9 requires the court to grant requests for oral argument on motions for summary judgment made by a party opposing summary judgment unless the summary judgment motion is denied. *Houston v. Bryan*, 725 F.2d 516, 518 (9th Cir. 1984), held that a violation of this rule is reversible error only if the violation is prejudicial. Investors argues that because the district court evidenced some uncertainty about whether Investors's motives for dismissing were relevant, denial of oral argument was prejudicial. *See Jasinski v. Showboat Operating Co.*, 644 F.2d 1277, 1280-81 (9th Cir. 1981). Since intent is not relevant to the Rule's application, the district court's alleged uncertainty was not pivotal.

The district court did not address Investors's privity concerns, but it permitted briefing on the question in Investors's motion to reconsider. Investors had the opportunity to apprise the district court of any arguments it

believed supported its position that the Transneva entities should not be dismissed. When a party has an adequate opportunity to provide the trial court with evidence and memorandum of law, there is no prejudice since any error can be rectified by an appeal of the summary judgment. *Bratt v. International Business Mach. Corp.*, 785 F.2d 352, 363 (1st Cir. 1986).

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAKE AT LAS VEGAS INVESTORS GROUP, INC., *Plaintiff-Appellant,* v. PACIFIC MALIBU DEVELOPMENT CORP., et al. *Defendants,* TRANSCONTINENTAL CORP., TRANSNEVA CORP., and TRANSNEVA LIMITED PARTNERSHIP, *Defendants-Appellees.*	No. 89-16496 D.C. No. CV-S-87-768-RDF ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Nevada
Roger D. Foley, District Judge, Presiding

Argued and Submitted
April 4, 1991 – San Francisco, California

Filed May 13, 1991
Amended August 23, 1991

Before: Thomas Tang, Jerome Farris and
Dorothy W. Nelson, Circuit Judges.

Opinion by Judge Farris

ORDER

The opinion filed May 13, 1991, is amended as follows:

(1) At slip op. page 6066 [A-10], first full paragraph, first sentence: substitute "Rule 41(a)(1) requires privity" for "privity is required"

(2) At slip op. page 6066 [A-10], first full paragraph, second and third sentences: substitute "but find the argument for a strict privity requirement inapplicable here. We agree" for "but we reject the argument for a strict privity requirement. Nevertheless, we agree"

(3) At slip op. page 6066 [A-10], last paragraph, first sentence: delete and substitute "The relationship between Transcontinental and the two Transneva defendants is sufficient to render them "substantially the same" for purposes of Rule 41(a)(1)."

(4) At slip op. page 6066 [A-10 – A-11], last paragraph, fourth sentence: substitute "two dismissals of the subsidiary's parent and claim Rule 41(a)(1) res judicata" for "rights of the subsidiary's parent for purposes of Rule 41(a)(1) res judicata"

With the foregoing amendments, the panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the amendments to the opinion and of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed.R.App.P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

FARRIS, Circuit Judge:

OVERVIEW

Lake at Las Vegas Investors Group, Inc. appeals the district court's dismissal of its action for interference with and breach of contract against Transcontinental Corporation, Transneva Corporation, and Transneva Limited Partnership. The dismissal was pursuant to the rule that two voluntary dismissals under Federal Rule of Civil Procedure 41(a) operate as an adjudication on the merits.

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1332(a)(1). This court has jurisdiction over the timely appeal pursuant to 28 U.S.C. § 1291.

ISSUES

(1) Whether the district court erred in granting Transcontinental's motion to dismiss pursuant to the two dismissal exception of Rule 41(a).

(a) Because Nev. Rev. Stat. § 80.210(1) rendered Investors's first complaint a nullity.

(b) because Investors's first dismissal was not "voluntary."

(c) Because neither dismissal was for the purpose of harassing Transcontinental.

(d) Because Investors's second dismissal was not a dismissal of an "action" within the meaning of Rule 41 since only one defendant was dismissed.

(2) Whether the district court erred in dismissing Transneva Corp. and Transneva Limited Partnership because Investors had not previously dismissed any complaint against them.

(3) Whether the district court's failure to allow oral argument pursuant to a local rule was prejudicial to Investors.

STANDARD OF REVIEW

A district court's dismissal on res judicata grounds is subject to de novo review. *Guild Wineries & Distilleries v. Whitehall Co.*, 853 F.2d 755, 758 (9th Cir. 1988).

FACTS

On October 9, 1987, Investors filed its first complaint against Pacific Malibu Development Corporation, Barry Silverton, and Transcontinental Corporation alleging that Transcontinental had interfered with and induced the breach of an agreement between Investors and Pacific Malibu and Silverton. On October 15, Investors filed a notice of voluntary dismissal of this complaint pursuant to Nevada Rule of Civil Procedure 41(a)(1) and refiled the same complaint immediately thereafter. Pacific Malibu removed to federal court on diversity grounds.

On November 10, 1987, Investors filed a voluntary dismissal of all claims against Transcontinental pursuant to Federal Rule of Civil Procedure 41(a)(1). It also moved to amend its complaint against Pacific Malibu and Silverton. On April 4, 1988, Investors moved for leave to add as parties Transcontinental, Transneva Corporation (a wholly owned subsidiary of Transcontinental), Transneva Limited Partnership (in which Transneva Corporation is a general partner), and Lake at Las Vegas Joint Venture.

On October 28, 1988, the district court granted Transcontinental's motion to dismiss Transcontinental and the two Transneva entities pursuant to the two dismissal rule of Rule 41(a)(1) and denied Investors's motion for oral argument. Investors's motion for reconsideration was denied.

DISCUSSION

I. *Applicability of Rule 41(a)*

Rule 41(a) provides that:

> Rule 41. Dismissal of Actions
>
> (a) Voluntary Dismissal: Effect Thereof
>
> (1) By Plaintiff; by Stipulation. . . . [A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a

> notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

Fed. R. Civ. P. 41(a). Investors offers several arguments in support of its contention that its two dismissals do not bring it within the operation of the Rule.

A. *Whether Filing in State Court Commenced an "Action"*

Nevada Revised Statute § 80.210(1) provides that foreign corporations "shall not be allowed to commence, maintain, or defend any action or proceeding in any court of the state" until registered to do business in Nevada. Investors argues that because it was not registered when it filed its first state court complaint, the complaint did not commence an action within the meaning of Rule 41(a), but rather was a "nullity" by operation of section 80.210(1). Therefore, it argues, its motion to dismiss under Rule 41(a) was not a voluntary dismissal of an action since an action never existed.

Nevada law does not provide a clear answer to this ingenious argument. *Compare League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 93 Nev. 270, 275, 563 P.2d 582, 585 (1977) (complaint filed by unregistered corporation is subject to dismissal even if the corporation later complies with 80.210(1) and does not toll statute of limitations) *and Bader Enterprises, Inc. v. Olsen*, 98 Nev. 381, 383, 649 P.2d 1369, 1370 (1982) (using the term "jurisdiction" when discussing section 80.210(1)) *with Harmon v.*

Telerent Leasing Corp., 93 Nev. 186, 187, 561 P.2d 1340, 1341 (1977) (referring to 80.210(1) as an affirmative defense) *and Marshall Earth Resources, Inc. v. Parks*, 99 Nev. 251, 252, 661 P.2d 875, 876 (1983) (plaintiff who sues an unregistered foreign corporation waives the issue of registration). Lack of capacity to sue is an affirmative defense in other contexts, *see Shaw v. Stutchman*, 105 Nev. Adv. Op. 27, 771 P.2d 156, 159 (1989), and an "action" is deemed commenced by the filing of a complaint under Nevada Rule of Civil Procedure 3. We reject Investors's argument. We hold that although the complaint may have been subject to dismissal, Investors commenced an "action" that could be and was voluntarily dismissed under Rule 41(a).

B. *Voluntariness of First Dismissal*

Investors next argues that, even if it did commence an "action" within the Rule, its first dismissal was not "voluntary." It bases this argument on the fact that its action would have been subject to dismissal under Nevada Revised Statute § 80.210(1). It urges us to hold that voluntary dismissal of a complaint subject to dismissal is no different than having the complaint dismissed by an order of the court.

In *Randall v. Merrill Lynch*, 820 F.2d 1317 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988), the D.C. Circuit explained:

> The term "voluntary" in Rule 41 means that the party is filing the dismissal without being compelled by another party or the court. In

> other words, it does not mean that other circumstances might not have compelled the dismissal or that the party desired it.

Id. at 1321. We find the D.C. Circuit's reasoning sound. Rule 41 distinguishes between voluntary, or section (a), dismissals and involuntary, or section (b), dismissals on the basis of which party initiates the dismissal. And, while it delineates the bases upon which the defendant may seek an involuntary dismissal, it does not consider the plaintiffs reasons for seeking a voluntary dismissal.

Further, there were alternatives to filing for voluntary dismissal. If Investors had allowed the defendants to move for a dismissal, it would have been without prejudice under Nevada law if Investors had complied with section 80.210 before the dismissal and the statute of limitations had not run. *See Atlantic Commercial Dev. Corp. v. Boyles*, 103 Nev. 35, 37, 732 P.2d 1360, 1362 (1987). In addition, Investors could have registered and then filed a motion with the court to have its case voluntarily dismissed pursuant to Rule 41(a)(2). *See Sutton Place Dev. Co. v. Abacus Mortgage Inv. Co.*, 826 F.2d 637, 640 (7th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988).

The Nevada Supreme Court's interpretation of voluntariness in *Hiles Co. v. Johnston Pump Co.*, 93 Nev. 73, 77, 560 P.2d 154, 156 (1977), does not control. *Hiles* involved a statutory savings clause that allowed certain U.C.C. actions to be recommenced within six months unless the prior dismissal was due to "voluntary discontinuance" or failure to prosecute. The Nevada court found that the plaintiff's stipulated dismissal without prejudice was not a "voluntary discontinuance" because the plaintiff was motivated by its failure to name the proper party

defendant. We decline to apply that analysis in the different context of Rule 41.

C. *Whether Rule 41(a)'s Two Dismissal Exception Requires Actual Intent to Harass*

Investors also argues that the two dismissal exception should not be applied if the dismissals were not for the purpose of harassing or abusing the defendants. The Rule does not require an inquiry into the circumstances of the two dismissals. However, a few cases have suggested that, in certain limited circumstances, the Rule will not be literally applied. In *Poloron Prod., Inc. v. Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012, 1017-18 (2d Cir. 1976), the Second Circuit held that the two dismissal bar of Rule 41(a) does not apply where one of the prior voluntary dismissals was by stipulation knowingly consented to by all parties. The court acknowledged that Rule 41(a) does not distinguish between unilateral and stipulated voluntary dismissals, but held that a stipulated voluntary dismissal posed little danger of harassment and therefore should not bar an otherwise proper suit. *Id.* at 1017. The court observed that the defendant could have declined to agree to the dismissal or could have insisted that it be with prejudice. *Id.* This holding, when followed, has been limited to its facts and does not preclude application of the bar where the voluntary dismissal is unilateral. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Randall*, 110 F.R.D. 499, 500 (E.D. Cal. 1986); *but see Island Stevedoring, Inc. v. Barge CCBI*, 129 F.R.D. 430, 432 (D.P.R. 1990).

Sutton Place Dev. Co. v. Abacus Mortgage Inv. Co., 826 F.2d 637, 640-41 (7th Cir. 1987), *cert. denied*, 485 U.S. 961

(1988), also cited by Investors, held that a dismissal *by motion* (i.e., a dismissal falling outside of the language of Rule 41(a)(1)) would not be considered for purposes of the two dismissal bar, because to do so would expand the exception to the rule that voluntary dismissals are without prejudice. *Sutton Place* limits an expansion of Rule 41(a)(1), but it hardly suggests that dismissals which fall *squarely within the language of the Rule* should be read out of it via an intent inquiry.

D. *Whether a Dismissal Must be of All Defendants*

Investors contends that under *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105 (2d Cir. 1953), *cert. denied*, 345 U.S. 964, its second dismissal was not a dismissal for Rule 41(a)(1) purposes because it dismissed only Transcontinental, and dismissal of an "action" occurs only when all defendants are dismissed.

Rule 41(a) may be invoked to dismiss less than all of the parties. *See, e.g., Wakefield v. Northern Telecom, Inc.*, 769 F.2d 109, 114 n.4 (2d Cir. 1985) (noting that *Harvey Aluminum*, 203 F.2d 105, is against the weight of authority); *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 194-95 (5th Cir. 1980); 5 J.W. Moore, J.D. Lucas, & T.S. Currier, *Moore's Federal Practice* § 41.06-1, at 41-84 to 41-89 (2d ed. 1988). We need not decide whether a Rule 41(a)(1) dismissal of less than all parties should be sufficient in every instance to trigger the two dismissal bar. We hold only that upon these facts, the Rule applies.

II. *Applicability of Dismissal to Transneva Entities*

Investors argues that even if the dismissal of Transcontinental was proper under the two dismissal bar, Transneva Corporation and Transneva Limited Partnership were never dismissed and therefore can not claim the benefit of the bar. The question is what relationship, if any, is required between the party twice dismissed and a party seeking to enforce the bar against the plaintiff.

Investors argues that Rule 41(a)(1) requires privity. We recognize that *Manning v. South Carolina Dept. of Highway & Public Transp.*, 914 F.2d 44, 48 (4th Cir. 1990), invoked privity in its analysis, but find the argument for a strict privity requirement inapplicable here. We agree with Investors that the weight of authority requires at least a relationship between the dismissed party and the party seeking to claim the benefit of the bar. *See, e.g.*, 9 C. Wright & A. Miller, *Federal Practice & Procedure* § 2368, at 190 (1971 & Supp. 1990) (unrelated parties should not be allowed to claim the benefit of Rule). The case relied upon by the Transneva defendants, *City of Raleigh v. College Campus Apartments*, 94 N.C. App. 280, 284-85, 380 S.E.2d 163, 166 (1989) (interpreting state rule identical to Rule 41(a)(1)), *aff'd*, 326 N.C. 360, 388 S.E.2d 768 (1990), is not to the contrary. While the court stated that no "same defendant" requirement should be read into the Rule, it also recognized that, as a factual matter, the defendant seeking to enforce the bar was "substantially the same" as the defendant dismissed; he was the sole shareholder and registered agent of the dismissed corporate defendant and had been named in the second dismissed action.

The relationship between Transcontinental and the two Transneva defendants is sufficient to render them "substantially the same" for purposes of Rule 41(a)(1). As in *City of Raleigh*, the plaintiff named the wrong, but closely related, entity. We need not define the precise parameters of the applicable test. We hold only that the wholly-owned subsidiary and partnership in which that subsidiary is the general partner may invoke the two dismissals of the subsidiary's parent and claim Rule 41(a)(1) res judicata. Investors's error is typical of the type of error motivating voluntary dismissals under Rule 41(a)(1). As a practical matter, the danger of harassment to the parent continued when the closely related Transneva entities were sued.

III. *Oral Argument*

Investors argues that the district court's failure to grant its request for oral argument requires reversal.

District of Nevada Local Rule 140-9 requires the court to grant requests for oral argument on motions for summary judgment made by a party opposing summary judgment unless the summary judgment motion is denied. *Houston v. Bryan*, 725 F.2d 516, 518 (9th Cir. 1984), held that a violation of this rule is reversible error only if the violation is prejudicial. Investors argues that because the district court evidenced some uncertainty about whether Investors's motives for dismissing were relevant, denial of oral argument was prejudicial. *See Jasinski v. Showboat Operating Co.*, 644 F.2d 1277, 1280-81 (9th Cir.

1981). Since intent is not relevant to the Rule's application, the district court's alleged uncertainty was not pivotal.

The district court did not address Investors's privity concerns, but it permitted briefing on the question in Investors's motion to reconsider. Investors had the opportunity to apprise the district court of any arguments it believed supported its position that the Transneva entities should not be dismissed. When a party has an adequate opportunity to provide the trial court with evidence and memorandum of law, there is no prejudice since any error can be rectified by an appeal of the summary judgment. *Bratt v. International Business Mach. Corp.*, 785 F.2d 352, 363 (1st Cir. 1986).

AFFIRMED.

Supreme Court, U.S.
FILED
AUG 7 1996
CLERK

No. 96-48

In The

Supreme Court of the United States

October Term, 1995

LAKE AT LAS VEGAS INVESTORS GROUP, INC.,

Petitioner,

v.

BOTABA REALTY COMPANY, BSF PARTNERS, SID R. BASS, ROBERT M. BASS and LEE M. BASS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RODNEY M. JEAN
LIONEL SAWYER & COLLINS
300 S. 4th St., #1700
Las Vegas, NV 89101
(702) 383-8830

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. Summary Of Argument.

The Court should deny the petition for writ of certiorari of Lake at Las Vegas Investors Group, Inc. for three reasons: (1) the petition presents an infrequently raised issue, the res judicata effect of a second dismissal under the two dismissal rule of Fed. R. Civ. P. 41(a)(1)(a); (2) the purported issue set forth in the petition was neither addressed nor decided by the court of appeals; and (3) independent state law grounds support the decision of the court of appeals. As a result, this case does not present a proper vehicle for determination of the policy issue raised by the petition.

II. Argument.

A. This Case Presents A Narrow Issue: The Scope Of The Fed. R. Civ. P. 41 (a)(1)(a) Two Dismissal Rule.

Although petitioner attempts to characterize this case as broadly addressing whether state or federal law should apply to determine the res judicata effect of a prior judgment in a diversity case, the actual issue is much more limited. In *Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu*, 933 F.2d 724 (9th Cir. 1991), *cert. denied*, 503 U.S. 920 (1992), the court of appeals considered the scope of the two dismissal provision of Fed. R.

Civ. P. 41(a)(1)(a), stating, "The question is what relationship, if any, is required between the party twice dismissed and a party seeking to enforce the bar against the plaintiff."

In answering that question, the court cited a Fourth Circuit case discussing the effect of a second dismissal ***in a South Carolina state court*** under that state's identical rule, *Manning v. South Carolina Dept. of Hwy. and Public Transp.*, 914 F.2d 44 (4th Cir. 1990), and a North Carolina Court of Appeals decision discussing that state's identical rule, *City of Raleigh v. College Campus Apartments, Inc.*, 94 N.C. App. 280, 380 S.E.2d 163 (1989), *aff'd.* 326 N.C. 360, 388 S.E.2d 768 (1990). The court cited no decisions discussing the effects of a second dismissal under the federal rule, much less court of appeals decisions addressing the res judicata effect of a second dismissal or any other final judgment of a federal court in a diversity case.

In the five years since the Ninth Circuit decided *Lake at Las Vegas*, no circuit level published decision has ever cited it. The Ninth Circuit's memorandum decision which gave rise to this petition similarly concerns only the scope of the prior second dismissal under Fed. R. Civ. P. 41(a)(1)(a). It does not cite a decision of any other circuit. Viewed in light of the issue actually decided below, the "split in the circuits" announced by petitioner recedes into a singular esoteric case.

B. The Issue Presented By Petitioner Was Neither Decided Nor Addressed Below.

The court of appeals memorandum decision as to which the writ is sought does not even purport to address

whether state or federal law should be applied to determine the res judicata effect of judgments rendered by federal courts in diversity cases. Because neither the court of appeals nor the district court considered the issue as to which petitioner seeks certiorari, that issue was not properly framed below. Thus, this case presents an inadequately developed record for deciding the issue.

C. Independent State Law Grounds Support The Decision Below.

Petitioner claims the circuit court erred by applying federal law to determine the parties to which the two dismissal rule of Fed. R. Civ. P. 41(a)(1)(a) applied, asserting, "Nevada law had to be applied and required privity to invoke res judicata." Petition at pp. 4-5, and, "the outcome of the case . . . as decided by a federal court sitting in diversity, is diametrically opposite of the result that would have been reached by a Nevada state Court." *Id.* at p. 6. However, petitioner misapprehends the requirements for application of res judicata under Nevada state law.

Analysis of this issue begins with *Paradise Palms Community Association v. Paradise Homes*, 89 Nev. 27, 505 P.2d 596, *cert. denied*, 414 U.S. 865 (1973). In *Paradise Palms*, the Nevada Supreme Court rejected mutuality of privity as a condition for pleas of prior adjudication, adopting the test first set forth in *Bernhard v. Bank of America Nat. Trust & Sav. Ass'n.*, 19 Cal.2d 807, 122 P.2d 892 (1942), and quoting *Bernhard* as follows:

> In determining the validity of a plea of ***res judicata*** three questions are pertinent: Was the

> issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party ***against*** whom the plea is asserted a party or in privity with a party to the prior adjudication?

505 P.2d at 599. (Emphasis added.) The Nevada Supreme Court then concluded:

> [*Bernhard*] is ***equally*** applicable to the doctrine of collateral estoppel. [Citations omitted.] We approve the *Bernhard* decision for Nevada.

Id. (Emphasis added.) Surely the Ninth Circuit properly concluded the Nevada Supreme Court would not require mutuality of privity for assertion of claim preclusion after citing with approval *Bernhard v. Bank of America Nat. Trust & Sav. Ass'n., supra,* for the proposition that res judicata did not require mutuality of privity, and holding the *Bernhard* case ***equally*** applicable to issue preclusion.

Since *Paradise Palms,* the Nevada Supreme Court has restated the elements of res judicata on numerous occasions, sometimes generally stating, "res judicata precludes parties or their privies from relitigating a cause of action," *e.g., Horvath v. Gladstone,* 97 Nev. 594, 596, 637 P.2d 531, 533 (1981); *University of Nevada v. Tarkanian,* 110 Nev. 581, 598, 879 P.2d 1180, 1190 (1994)[1], then restating the three part test set forth in *Paradise Palms; Horvath,* 97

---

[1] Petitioner claims the three part test for res judicata actually applies only to collateral estoppel, or issue preclusion. However, in *Tarkanian,* the court followed its citation of the three part test with a discussion of the differences between claim preclusion and issue preclusion. No attempt was made to divorce the three part test from either application of res judicata.

Nev. at 596, 637 P.2d at 533; *Tarkanian*, 110 Nev. at 598, 879 P.2d at 1190; *Pulley v. Preferred Risk Mut. Ins. Co.*, 111 Nev. Adv. Op. 89 at 2-3, 897 P.2d 1101, 1102-03 (1995). *See also, Landex, Inc. v. State ex rel. List*, 94 Nev. 469, 475-76, 582 P.2d 786, 790 (1978); and *City of Reno v. Nevada First Thrift*, 100 Nev. 483, 488, 686 P.2d 231, 234 (1984) (applying the three part test). The third element of that test requires only that the party ***against*** whom the judgment is asserted must have been a party or is privity with a party to the prior litigation. Because petitioner was the plaintiff in the lawsuit at all times before and after the addition of the Botaba defendants, claim preclusion was properly asserted against it.

III. Conclusion.

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

RODNEY M. JEAN
(Counsel of Record)
LIONEL SAWYER & COLLINS
300 S. 4th St., #1700
Las Vegas, NV 89101
(702) 383-8951

Attorneys for Respondents

No. 96-48

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

BRUCE W. KAUFFMAN
(Counsel of Record)
CARL H. HANZELIK
VIRGINIA H. MCMICHAEL
DILWORTH, PAXSON, KALISH & KAUFFMAN
3200 Mellon Bank Center
1735 Market Street
Philadelphia, Pennsylvania 19103
(215) 575-7000

BARRY L. LIEBERMAN
DICKERSON, DICKERSON, LIEBERMAN & CONSUL
Suite 1130, The Phoenix Building
330 South Third Street
Las Vegas, Nevada 89101
(702) 388-8600

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

The points raised in the Opposition to the instant Petition are mistaken:

A. The Issue Presented Is Not Limited

The res judicata law to be applied to a prior diversity judgment does not depend on the legal issue decided in the preceding action, and there is no separate res judicata law for judgments arising from the two dismissal exception of Fed.R.Civ.P. 41(a)(1). Thus, the issue here presented is as stated in the Petition, and there is a widespread split and confusion over it among the Circuits.

B. The Issue Was Presented To Both The District Court And The Ninth Circuit

Contrary to the suggestion in the Opposition, the issue stated in the Petition *sub judice* was presented to both the District Court and the Ninth Circuit. On the appeal, it was presented both in the briefs and the Petition For Rehearing.

As indicated in the Petition, and as not disputed by respondents, the Courts of Appeals have been floundering for years with this issue. That the absence of a resolution over an extended period of time now produces decisions which do not even bother to address this outcome-determinative issue proves all the more the urgent necessity for this Court now to resolve it.

One of the cornerstones of the *Erie* doctrine is that the outcome of an action should not depend on whether it is brought in a state court or a federal court sitting in diversity. As it now stands, whether the outcome of a diversity case dependent upon the res judicata effect of a prior diversity judgment will be the same as the outcome of the same case brought in a state court can and does vary based not only on the Circuit in which the action is brought, but on the panel within a Circuit which hears the appeal. The rule of law and proper and fair administration of justice no longer can countenance such arbitrariness.

C. The Decision Below Is Directly Contrary To Nevada Law

As set forth in the cases cited in the Petition (page 5, fn. 1), Nevada law holds that to benefit from the res judicata (claim preclusion) effect of a prior judgment, one must be a party or the privy of a party to the prior judgment. Respondents nonetheless claim that privity is not a requirement of "res judicata" under Nevada law.

As prior briefs in this litigation have repeatedly pointed out, despite use of the generic term "res judicata" in the cases cited by respondents, the Nevada Supreme Court's *Paradise Palms* decision, and the California Supreme Court's *Bernhard* decision which is quoted extensively in *Paradise Palms*, dealt with collateral estoppel (issue preclusion), *not* res judicata (claims preclusion). Under the doctrine of collateral estoppel (issue preclusion), mutuality of privity no longer is necessary.

However, no case in Nevada or elsewhere ever has eliminated privity as a requirement for a non-party to a prior judgment to invoke *claim* preclusion successfully, which respondents have been allowed to do here. As this Court stated in *Nevada v. United States*, 463 U.S. 110, 143 (1983), "while mutuality of estoppel has been for the most part abandoned in cases involving collateral estoppel, it has remained a part of the doctrine of res judicata."

The use in Nevada state court cases of the generic term "res judicata" when actually referring to collateral estoppel has been noted to have created much confusion. *Sierra Pacific Power Co. v. Craigie*, 738 F. Supp. 1325, 1327-29 (D. Nev. 1990). Respondents continue to play upon that confusion in their Opposition.

Respectfully submitted,

BRUCE W. KAUFFMAN
(Counsel of Record)
CARL H. HANZELIK
VIRGINIA H. MCMICHAEL
DILWORTH, PAXSON, KALISH & KAUFFMAN
3200 Mellon Bank Center
1735 Market Street
Philadelphia, Pennsylvania 19103
(215) 575-7000

BARRY L. LIEBERMAN
DICKERSON, DICKERSON, LIEBERMAN & CONSUL
Suite 1130, The Phoenix Building
330 South Third Street
Las Vegas, Nevada 89101
(702) 388-8600

Attorneys for Petitioner